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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY,

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN SUPPORT

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BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN SUPPORT

Respondent, General Motors Corporation ("General Motors"), through its Counsel, hereby files its Brief in support of the Petitions for a writ of certiorari filed before this Court by Pacific Lighting Service Company and Southern California Gas Company on September 5, 1975, and by the People of the State of

California and the Public Utilities Commission of the State of California on September 6, 1975, and respectfully prays that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on April 25, 1975, in *Pacific Lighting Service Company et al.* v. *FPC*, —— F.2d ——, Nos. 73-2538 et al.

QUESTION PRESENTED

When a pipeline company files a proposed tariff change pursuant to § 4(d) of the Natural Gas Act, and customers of the pipeline lodge formal complaints under § 4(e) raising serious questions regarding the justness and reasonableness of the proposal, and no evidence whatsoever exists either for or against the proposed change, is the Federal Power Commission required to hold a hearing under § 4(e), in which the pipeline has the burden to prove the proposal just and reasonable, or does the Commission have discretion under § 4(e) to accept and make effective the proposed tariff and subsequently to conduct a hearing under § 5(a), thereby assigning the burden of proof to the complainants?[1]

SUPPLEMENTAL STATEMENT OF THE CASE

General Motors accepts the Statements of the Case as set forth by the Petitioners, with one important addition. Promptly following the issuance, on May 4,

[1] This case does not involve a closely-related question, often raised in the past, regarding the Commission's suspension powers under § 4(e). It is well-settled that the Commission's exercise of its suspension power is discretionary. *Arrow Transportation Company* v. *Southern Railway Company*, 372 U.S. 658 (1963). The question raised in this case concerns the Commission's duty to hold hearings under § 4(e).

1973, of public notice[2] of the new curtailment plan proposed by Transwestern Pipeline Company ("Transwestern"), several of Transwestern's customers, both direct and indirect, filed complaints specifically requesting that the Commission order formal hearings on the justness and reasonableness of Transwestern's proposal.[3] These formal complaints were timely-filed under § 4(e) prior to the May 22, 1973, deadline date established by the Commission's Notice, and prior to the Commission's May 31, 1973, Order[4] under review accepting Transwestern's proposed tariff sheets and permitting the new curtailment plan to go into effect without hearings under § 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1970). In applications for rehearing[5] of the May 31 Order, these same parties once again raised serious questions regarding the justness and reasonableness of the proposal prior to the issuance of the second Order under review issued on August 1, 1973.[6]

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[2] Notice of Proposed Changes in FPC Gas Tariff, *Transwestern Pipeline Co.*, FPC Docket No. RP73-101 (May 4, 1973). (J.A. 21-22).

[3] Complaints were filed by the following parties: San Diego Gas & Electric Company (on May 18); Pacific Lighting Service Company and Southern California Gas Company, jointly (on May 22); and Southern California Edison Company (on May 22). (J.A. 25, 32).

[4] Order Accepting for Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions, *Transwestern Pipeline Co.*, FPC Docket No. RP73-101, 49 F.P.C. 1243 (May 31, 1973).

[5] J.A. 34-54. In addition, two parties filed applications after the thirty-day deadline but prior to the Commission's Order on Rehearing of August 1, 1973. (J.A. 55-70).

[6] Order Denying Rehearing and Reconsideration, Instituting Complaint Proceeding, and Establishing Procedures, *Transwestern Pipeline Co.*, FPC Docket No. RP73-101, 50 F.P.C. 343 (Aug. 1, 1973). (J.A. 70-76).

SUMMARY OF POSITION

Respondent, General Motors, operates various manufacturing facilities throughout the United States. Seven of these facilities consume substantial volumes of natural gas obtained from gas distribution companies served at least in part through the Transwestern system. Four of these plants are located in California, two are in Kansas, and one is in Missouri. Much of the natural gas consumed in these plants is used in industrial processing operations for which natural gas is the only practicable fuel, and thus General Motors is vitally concerned with the curtailment plan implemented by Transwestern.

General Motors firmly supports the position of Petitioners that the Orders of the Federal Power Commission under review are totally unsupported by any evidence, much less substantial evidence of record as required by § 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1970). Indeed, it is only too obvious that the new curtailment plan proposed by Transwestern and approved by the Commission in this case was engendered not by an adjudicatory record (since no hearings have ever been held), but solely by the Commission's so-called Order No. 467-B,[7] which shortly following the issuance of the two Orders under review, was held to be not an "order" at all but a mere policy statement having no substantive effect. *Pacific Gas and Electric Company* v. *FPC*, 506 F.2d 33, 40-44 (D.C. Cir. 1974). General Motors also agrees with Petitioners that the decision of the Court of Appeals below

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[7] Order No. 467-B, Order Modifying Order 467, Statement of Policy, and Order Denying Motions for Reconsideration, *Utilization and Conservation of Natural Resources—Natural Gas Act*, FPC Docket No. R-469, 49 F.P.C. 583 (March 2, 1973); codified in 18 C.F.R. § 2.78(a) (1974).

is in clear conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Pacific Gas, supra.* In that case, the District of Columbia Circuit made it abundantly clear to the Commission that it could not apply Order 467-B in individual curtailment proceedings without first scheduling hearings under § 4(e) of the Natural Gas Act. 506 F.2d at 40-43. In the instant case, however, the Commission brushed aside Petitioners' (and others') requests that § 4(e) hearings be held on Transwestern's Order 467-B curtailment plan, and it scheduled limited hearings only under § 5(a), and then only after it permitted Transwestern's new plan to become effective on a final basis as a permanent plan. The Court below was fundamentally in error when it characterized the Commission's approval of Transwestern's proposed curtailment plan as merely "provisional," pending the outcome of the § 5(a) hearing.[8]

Because the decision of the Court of Appeals for the Ninth Circuit, for which Petitioners seek a writ of certiorari, affirms the Commission's Orders in this case, the decision—despite its brevity—raises serious questions regarding the efficacy of the protection afforded to consumers by the Natural Gas Act. The novel procedure employed by the Commission in this case permitted a totally unproven curtailment plan to go into effect on Transwestern's system as a final plan without hearings over numerous timely-filed protests of Transwestern's customers. At the very least, the Commission should have permitted Transwestern's proposed plan to go into effect pending hearings on its justness and reasonableness under § 4(e) of the Natural Gas Act, in which the plan's proponent, Trans-

[8] Pacific Lighting Serv. Co. et al. v. FPC, — F.2d —, Nos. 73-2538 et al. (9th Cir. April 25, 1975), slip op. at 2-3.

western, would have borne the burden of proof. Instead, the Commission, after the plan went into effect, scheduled hearings only under § 5(a), in which the consumers opposing the plan would bear the burden of proof. If the decision of the Court of Appeals is not reversed by this Court, it will create a major gap in the procedural safeguards afforded to consumers not only by the Natural Gas Act but also by similar regulatory statutes.

REASONS FOR GRANTING THE WRIT

I. The Differences Between a Section 4(e) Hearing and a Section 5(a) Hearing Are Substantial.

As this Court recently noted in *FPC* v. *Louisiana Power & Light Company*, 406 U.S. 621, 643 (1972), the Natural Gas Act, 15 U.S.C. §§ 717 et seq. (1970), provides two procedural mechanisms—§ 4(c), (d), and (e) and § 5(a)—for the evaluation of curtailment plans. The Court also noted that "[t]he § 5(a) procedure has substantial disadvantages, however, *rendering it unsuitable for the evaluation of curtailment plans.*" (emphasis added). 406 U.S. at 643.[9] The two reasons given by the Court were: (1) that the Commission can take no remedial action under § 5(a) until after completion of a full hearing on a curtailment plan, and (2) that a remedial order issued under § 5(a) can have prospective application only. 406 U.S. at 643-44.

General Motors respectfully submits that the facts of this case illustrate yet another reason why § 4(e) provides appropriate procedures for the evaluation

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[9] *Accord*, Michigan Power Co. v. FPC, 494 F.2d 1140, 1144 (D.C. Cir. 1974); Atlanta Gas Light Co. v. FPC, 476 F.2d 142, 148 (5th Cir. 1973).

of curtailment plans proposed by jurisdictional pipeline companies, while § 5(a) does not. As stated in the last sentence of § 4(e), "the *burden of proof* to show that the increased rate or charge is just and reasonable *shall be upon the natural-gas company, . . .*" (emphasis added). In *FPC* v. *Louisiana Power & Light Company, supra,* this Court interpreted this provision to mean that, when a curtailment plan (rather than a rate increase) is proposed by a pipeline company under § 4, the ". . . pipeline has the burden of proving that its plan is reasonable and fair." 406 U.S. at 646. *Accord, Pacific Gas and Electric Company* v. *FPC,* 506 F.2d 33, 43 (D.C. Cir. 1974). Under § 5(a), however, the burden of proof normally is shifted to the party attacking a tariff.[10]

The assignment of the burden of proof in administrative proceedings under the Natural Gas Act, which necessarily depends on the choice of whether a § 4(e) or a § 5(a) hearing is to be held, is deeply-rooted in the legislative evolution of the Natural Gas Act, as well as other major regulatory statutes providing for similar hearing procedures.[11] Under the original Interstate Commerce Act of 1887 (which, as amended, served as the model for the Natural Gas Act), a carrier did not bear the burden of proving that its proposed new rates were just and reasonable, and it could establish new rates simply by filing a schedule of the new rates with the ICC and by furnishing copies of the schedule to its

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[10] FPC v. Texaco Inc., 417 U.S. 380, 389 (1974); American Smelting and Ref. Co. v. FPC, 494 F.2d 925, 940-41 (D.C. Cir.), *cert. denied,* Southern California Gas Co. v. FPC, 419 U.S. 882 (1974); State Corp. Comm'n. of Kansas v. FPC, 206 F.2d 690, 713 (8th Cir. 1953), *cert. denied,* 346 U.S. 922, *rehearing denied,* 347 U.S. 1002 (1954).

[11] These statutes are listed at page 16 of the text, *infra.*

freight offices.[12] Although carriers had a duty under the statute to charge only "just and reasonable" rates, the remedy available to consumers assessed unreasonable rates was limited to a suit at common law for damages.[13] In 1906, the ICC was empowered by the Hepburn Act[14] to determine the justness and reasonableness of rates already in effect under what is now § 15(1) of the Interstate Commerce Act,[15] the analogue of § 5(a) of the Natural Gas Act. In 1910, the Mann-Elkins Act[16] empowered the ICC to hold hearings on proposed new rates under what is now § 15(7) of the Interstate Commerce Act,[17] which is the analogue of § 4(e) of the Natural Gas Act. In a hearing held under § 15(7), the ICC was fully empowered to suspend proposed rates, to order refunds, and to hold hearings prior to the time that proposed new rates went into effect. Moreover, for the first time, the burden to prove the justness and reasonableness of a proposed new rate increase was imposed on the carrier.[18] More recently, with the passage of the Administrative Procedure Act in 1946, Congress made it clear that, as a general rule,

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[12] Texas & Pac. Ry. Co. v. Cisco Oil Mill, 204 U.S. 449 (1907).

[13] Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

[14] 34 Stat. 589.

[15] 49 U.S.C. § 15(1) (1959).

[16] 36 Stat. 552.

[17] 49 U.S.C. § 15(7) (1959).

[18] 36 Stat. 552. In 1940, the burden of proof provision in § 15(7) was amended to its present form to impose the burden of proof on the carrier with respect to any change in rate, fare, charge, classification, rule, regulation, or practice. 54 Stat. 912; 49 U.S.C. § 15(7) (1959).

the proponent of change in administrative proceedings should bear the burden of proof.[19]

Consequently, twenty-three years after passage of the original Interstate Commerce Act, Congress firmly established the fundamental proposition that the regulated entity should bear the burden of demonstrating the justness and reasonableness of its tariff proposals. As noted, this fundamental legislative decision has been repeatedly reaffirmed in the major regulatory acts modeled after the Interstate Commerce Act and in the Administrative Procedure Act. Congress has undoubtedly recognized that consumers—the persons to be protected by these regulatory acts—would find it unduly burdensome, if not virtually impossible, to prove that a tariff proposed by a regulated entity is unjust and unreasonable. In matters depending for their resolution upon substantial and detailed technical data, virtually all of which is in the custody and possession of the regulated entity, even the most diligent consumer effort to challenge a proposal by a regulated entity will have difficulty succeeding. Only if the burden of proof is placed on the regulated entity proposing a change are the odds made somewhat even.

For example, if a pipeline company proposed under § 4(d) to double its rates, an effective challenge to the proposal would require extensive knowledge of the pipeline's markets as well as its operations. As guardian of consumer interests, the Commission must not be permitted to shackle consumers in their effort to counter the pipeline's proposal by employing the novel procedure utilized in this case: (1) permit the pro-

[19] Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1967), originally enacted in 1946, reads:

> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . .

posal to go into effect over consumer protests filed under § 4(e), without first holding hearings under § 4(e) in which the pipeline would bear the burden of proof; (2) refuse to suspend the effectiveness of the proposal or to provide for refunds; and (3) after the new tariff has gone into effect, treat the protests as complaints filed under § 5(a) and order hearings to be held under § 5(a), thereby imposing the burden of proof on the complainants and rendering the Commission powerless to grant retroactive relief at a later date should the consumers ultimately prevail in their effort to prove the tariff unjust and unreasonable.

2. Whenever a Formal Complaint Is Lodged with the Commission under § 4(e) Raising Serious Questions Regarding the Justness and Reasonableness of a Proposed Tariff Change Filed by a Pipeline under § 4(d), the Commission Is Required To Conduct a Full Hearing under § 4(e) on the Proposal and To Hold the Pipeline to Its Burden of Proof in § 4(e).

If a pipeline proposes a tariff change under § 4 of the Natural Gas Act, and no complaint is lodged questioning the justness and reasonableness of the proposal, the Commission may accept the proposal and permit it to go into effect without hearings.[20]

In this proceeding, however, several of Transwestern's customers timely filed formal complaints under § 4(e) prior to the issuance of the Commission's Orders under review, in which they raised serious questions regarding the justness and reasonableness of Transwestern's proposal. The filing of these complaints—so long as they were not frivolous—clearly triggered the requirement in § 4(e), as well as the gen-

[20] Pennsylvania Gas and Water Co. v. FPC, 463 F.2d 1242, 1251 (D.C. Cir. 1972); Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

eral rule in § 7(c) of the Administrative Procedure Act, that the pipeline meet its burden of proving the justness and reasonableness of its proposal. In addition, § 4(a) of the Natural Gas Act requires that all tariffs must be "just and reasonable." The Commission's acceptance of a proposed tariff change under 4(e), coupled with a refusal to order hearings under § 4(e) in the face of complaints filed under § 4(e) urging such hearings, necessarily implies that the accepted tariff is in fact just and reasonable. Since § 19(b) of the Natural Gas Act explicitly requires the Commission to act on the basis of substantial evidence,[21] and since the Commission's Orders are final orders terminating the § 4 proceeding commenced by Transwestern's filing, the filing of the complaints by Transwestern's customers imposed upon the Commission the duty to ensure that its Orders were supported by substantial record evidence and thus precluded the Commission from effectuating Transwestern's proposal without also holding hearings under § 4(e).

Judicial precedent makes it clear that the Commission has no discretion to take summary action under § 4 of the Natural Gas Act, except in *pro forma* matters. It is well-settled that the Commission, over the complaint of a party filed under § 4(e), has no power summarily to accept a proposed new rate filed by a pipeline company under § 4(d) without first examining the complaint to determine whether it is frivolous.[22] It is also well-settled that the Commission may not summar-

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[21] 15 U.S.C. § 717r(b) (1970).

[22] United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956); Shell Oil Co. v. FPC, 334 F.2d 1002, 1007 (3d Cir. 1964); Natural Gas Pipeline Co. v. FPC, 253 F.2d 3, 7 (3d Cir.), *cert. denied*, Dorchester Corp. v. Natural Gas Pipeline Co., 357 U.S. 927 (1958).

ily reject a proposal filed under § 4(d) if the filing complies with the requirements of the Commission's rules regarding the form of § 4 filings and the filing is not void on its face.[23] General Motors submits that, in view of these precedents, the Commission was powerless to ignore the complaints of Transwestern's customers (which the Commission did *not* find to be frivolous) and to accept summarily Transwestern's proposed new tariff, without ordering hearings under § 4(e) in order to evaluate the complaints in the light of substantial record evidence as required by § 19(b).

In the instant case, the Commission acted wholly without any evidence—much less substantial evidence —when it summarily accepted Transwestern's proposed tariff change over the protests of Transwestern's customers. This is necessarily the case, since no hearings previously had been held, and since the Commission scheduled hearings under § 5(a) only *after* the new plan went into effect. It should go without saying that the Commission cannot even begin to fill this evidentiary void with its Order 467-B,[24] since, as the Court of Appeals below[25] and the Petitioners here[26] have noted, Order 467-B is a mere policy statement having no binding substantive effect.

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[23] Municipal Light Bds., etc., Mass. v. FPC, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Mississippi River Fuel Corp. v. FPC, 202 F.2d 899, 901-902 (3d Cir.), *cert. dismissed*, 345 U.S. 988 (1953).

[24] Order No. 467-B, *supra*, note 7.

[25] Pacific Lighting Serv. Co. et al. v. FPC, — F.2d —, Nos. 73-2538 et al. (9th Cir. April 25, 1975) slip op. at 2.

[26] Petition of Pacific Lighting et al. at 15-16; Petition of the State of California et al. at 13.

3. The Opinion of the Court of Appeals, if Not Reversed by This Court, Will Have a Substantially Detrimental Impact on the Effectiveness of the Protection Afforded to Consumers by the Natural Gas Act, as Well as Similar Statutes, and Will Cause Serious Practical Problems in the Case at Bar.

If Petitioners prevail before this Court, the practical impact on Transwestern will be unnoticeable. It is not the position of Petitioners, nor is it the position of Respondent, General Motors, that the Commission should have *suspended* the effectiveness of Transwestern's proposed curtailment plan pending hearings on its lawfulness. Rather, the Commission should have held hearings under § 4(e) instead of under § 5(a). Thus, if Petitioners prevail, Transwestern would not be placed in the position of being without an effective curtailment plan when curtailments are necessary due to gas supply shortages.

However, the impact of the Ninth Circuit's decision will be quite substantial for Transwestern's customers. As noted by this Court on numerous occasions, the primary purpose of the Natural Gas Act is to protect consumers from unjust and unreasonable tariffs.[27] On a most rudimentary level, the fact that the Commission accepted Transwestern's proposed curtailment plan on a final basis, rather than pending § 4(e) hearings, over timely consumer protests and in the absence of any evidence, presents a major threat to the procedural safeguards provided in the Natural Gas Act for the protection of gas consumers. Indeed, this case

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[27] *E.g.*, FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 154 (1962); FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 19 (1961); Atlantic Ref. Co. v. Public Serv. Comm'n of N.Y. (CATCO), 360 U.S. 378, 388 (1959); Panhandle E. Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 520 (1947); FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

presents no less a question than whether natural gas consumers have for their protection the law of the Natural Gas Act or merely the discretion of the Federal Power Commission.

To illustrate the inadequacy of the novel procedure utilized in this case, assume that the FPC issues a policy statement suggesting that, in order to assist the urban poor, all pipelines immediately should file rates providing a 50% discount to distributors serving cities with populations exceeding 500,000. All pipelines immediately respond (as Transwestern did in this case to Order No. 467-B) by filing proposed new tariffs under § 4(d) containing the suggested discount. The Commission is deluged with consumer protests filed under § 4(e). Nevertheless, the Commission accepts the proposed tariffs under § 4(e) without first providing for hearings, suspension, or refunds. After the rates go into effect, the Commission issues a further order in which it declares that the complaints filed under § 4(e) will be treated as having been filed under § 5(a), and it proffers the complaining consumers a § 5(a) hearing, thus making it very clear that they will bear the burden of proving the new rates unjust and unreasonable. Under such circumstances, can it reasonably be said that the Commission has adequately discharged its statutory duty to protect the public interest? Certainly the complaining consumers would say no. More importantly, who is to say, without substantial evidence, that the 50% discount will have the intended effect of benefitting the urban poor? Who is to say, without substantial evidence, that the urban poor should receive a benefit not made available to the rural or small-town poor? Yet, this plainly inadequate summary procedure is identical to the procedure utilized in this case.

The practical consequences for Transwestern's customers arising from this novel procedure are evident. As noted, shortly following the issuance of the Commission's Orders in this case, Order 467-B, upon which Transwestern f[illegible] obliged to model its proposed curtailment plan and which is the only alleged support for its plan, was held by the United States Court of Appeals for the District of Columbia Circuit to have no substantive effect.[28] One of the fundamental concepts of Order 467-B—the distinction between so-called "firm" service and so-called "interruptible" service—has been repudiated by the District of Columbia Circuit [29] as well as the Fifth Circuit [30] in the cases that so far have reached the courts of appeals to review the Commission's application of Order 467-B in adjudicatory proceedings looking toward the prescription of permanent pipeline curtailment plans. Thus, one of the major aspects of the Commission's preferred curtailment plan (Order 467-B) has thus far failed to withstand judicial scrutiny. Yet, the Ninth Circuit here would shift to consumers purchasing on an "interruptible" basis the burden of demonstrating that the "firm"-"interruptible" dichotomy of Order 467-B (as reflected in Transwestern's curtailment plan), as well as other significant aspects of the Order 467-B priorities, are unjust and unreasonable. The Commission's procedural legerdemain, through which it effectuated Transwestern's Order 467-B curtailment plan intact on a final basis, without ordering a § 4(e) hearing, should not be condoned where the economic stakes, in terms

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[28] Pacific Gas and Elec. Co. v. FPC, 506 F.2d 33, 40-44 (D.C. Cir. 1974).

[29] Arkansas Power & Light Co. v. FPC, — F.2d —, Nos. 73-1637 et al. (D.C. Cir. August 21, 1975) slip op. at 1638-39. *See also,* Consolidated Edison Co. of N.Y. v. FPC, 511 F.2d 372, 379-80 (D.C. Cir. 1974).

[30] State of La. v. FPC, 503 F.2d 844, 872 (5th Cir. 1974).

of jobs and the relative prosperity of substantial regions of the nation, could be so high.[31]

The Ninth Circuit's decision also raises serious questions regarding the effectiveness of other regulatory statutes that, like the Natural Gas Act, contain hearing procedures modeled after those first enacted by Congress for the Interstate Commerce Act and presently embodied as § 15(1) and §15(7) of that Act.[32] The other principal statutes of this type are: the Federal Aviation Act,[33] the Communications Act of 1934,[34] the Federal Power Act,[35] the Freight Forwarders Act,[36] the Motor Carrier Act,[37] and the Water Carrier Act.[38] Under all of these statutes, the decision of the Court of Appeals necessarily raises this question: whether a regulatory commission empowered to act under one of these statutes may summarily accept and make effective on a final basis not pending hearings a tariff change proposed by a regulated company where no evidence exists to support the proposed change and where the consumers that these statutes were enacted to protect raise serious questions regarding the lawful-

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[31] The practical importance of the assignment of the burden of proof in administrative proceedings was eloquently expressed by Judge Leventhal in his dissenting opinion (on an unrelated issue) in *Cities of Canton, Cleveland, and Massillon* v. *FPC*, 360 F.2d 521, 527 (D.C. Cir. 1966) as follows:

> [P]rotection of consumers typically lies in diligent attention to procedural requirements, particularly those involving the burden of proof and presentation resting on utilities which seek a change in revenues.

[32] 49 U.S.C. § 15(1), (7) (1959).

[33] 49 U.S.C. § 1482(d), (f), (g), (h) (1963).

[34] 47 U.S.C. §§ 204, 205 (1962).

[35] 16 U.S.C. §§ 824d(e), 824e(a) (1974).

[36] 49 U.S.C. § 1006(b), (e) (1963).

[37] 49 U.S.C. §§ 316(f), (g); 318(b), (c) (1963).

[38] 49 U.S.C. § 907(d)-(i) (1963).

ness of the proposed change. If the Ninth Circuit's opinion that the Federal Power Commission, under such circumstances, may refuse to require the regulated company proposing the tariff change to observe its burden to prove the change just and reasonable in a hearing initiated prior to the effectiveness of the new tariff and may assign the burden of proof to the complainants in a hearing initiated after the effectiveness of the new tariff, then necessarily the same principle will apply in proceedings before other regulatory commissions.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent, General Motors Corporation, respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on April 25, 1975, in *Pacific Lighting Service Company et al.* v. *FPC*, —— F.2d ——, Nos. 73-2538 et al.

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